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No. 90-1156

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

NEW ORLEANS PUBLIC SERVICE INC.,
Petitioner,

v.

THE COUNCIL OF THE CITY OF NEW ORLEANS, JOSEPH I. GIARRUSSO, LAMBERT C. BOISSIERE, JR., MICHAEL EARLY, JAMES SINGLETON, DOROTHY MAE TAYLOR, JOHNNY JACKSON, and PEGGY WILSON,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONER'S REPLY TO COUNCIL'S BRIEF IN OPPOSITION TO PETITION

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v.

THE COUNCIL OF THE CITY OF NEW ORLEANS, *et al.*,
Respondents.

PETITIONER'S REPLY TO COUNCIL'S BRIEF IN OPPOSITION TO PETITION [1]

The Council's Opposition ("Opp.") is an elaborate attempt to obscure the facts that have led FERC and the Solicitor General's Office [2] and the electric industry [3] to urge the Court to review, and reverse, the Fifth Circuit's decision in this case. But the Council's rhetoric and misstatements cannot obscure (1) the square conflict with *MP&L*, *Nantahala*, and numerous other prior preemption decisions,[4] (2) the irrelevance of the Court's prior abstention decision, or (3) the profound importance of a resolution of the conflicts in this case.

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[1] The Rule 29.1 Statement appears at p. ii of the Petition.

[2] *See* Brief for United States and FERC As Amici Curiae Supporting Petitioner (February, 1991).

[3] *See* Brief for Edison Electric Institute As Amicus Curiae Supporting Petitioner (February, 1991).

[4] *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354 (1988); *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953 (1986); *see* Pet. 13 & n.10 & 17-20.

I. The Council's Order Is Facially Preempted Under *MP&L* and *Nantahala*.

First, the Opposition admits the facts that establish the square conflict with this Court's holdings in *MP&L* and *Nantahala*. The Council concedes that it has barred NOPSI from passing through to its retail customers—and thus "trapped"—$135 million of the Grand Gulf expenses that FERC ordered NOPSI to incur. Opp. 10-11. *Nantahala* prohibits this "trapping" of costs. It holds that "a state utility commission setting retail prices must allow, as reasonable operating expenses, costs incurred as a result of paying a FERC-determined wholesale price." *Nantahala*, 476 U.S. at 965. *MP&L* applied this principle to the very Grand Gulf costs at issue. It holds that a retail ratemaking body "may not enter an order 'trapping' the costs [MSU operating companies are] mandated to pay under the FERC order allocating Grand Gulf power or [even] *undertake a 'prudence' review for the purpose of deciding whether to enter such an order.*" *MP&L*, 487 U.S. at 372 (emphasis added).

In short, *MP&L* and *Nantahala* held that such state prudence disallowances *are* "categorical[ly]" and "facial[ly]" preempted. *Compare* Opp. 4 & 12-14. *MP&L* and *Nantahala* so held because they recognized that FERC has exclusive jurisdiction to decide—and "easily could" decide—any and all claims that a "prudent" utility could or would have otherwise reduced the wholesale costs FERC ordered it to incur. *MP&L*, 487 U.S. at 375; *id.* at 378-83 (Scalia, J., concurring). Indeed, because the Council filed an *amicus* brief in *MP&L* that unsuccessfully argued against this Court's outright reversal by raising the same arguments the Council now advances, it could not be clearer that *MP&L* forecloses the Council's claims. *See* Pet. 15 n.11.

The attempts to distinguish *MP&L* and *Nantahala* are futile. Indeed, even the Council recognizes that *MP&L* and numerous state and federal decisions reject the ground for the Fifth Circuit's judgment: its holding that it is the states, and not FERC, that have jurisdiction to

determine whether utilities "acted imprudently" in failing to "minimize their losses" while construction of a wholesale plant is "underway." *Compare* Opp. 13 & 18-19, *with* Pet. 12-20.

However, the Council makes an alternative argument that is, if anything, even less tenable. Opp. 15-17. It claims that the Federal Power Act recognizes a distinction between (1) determining a utility system's prudence in undertaking, constructing, and completing a plant and allocating the costs among individual participating utilities—which are matters for FERC—and (2) determining if an individual utility could have and prudently should have reduced its wholesale costs by entering into "off-system" sales of higher cost power and "off-system" purchases of lower cost power from "alternative power sources"—which, the Council claims, are matters for the states.

This is nonsense. The terms of the Act permit no such distinction, for it gives FERC exclusive jurisdiction to assure that all aspects of purchases and sales of power "for resale" are "just and reasonable." Moreover, the matter clearly falls within the scope of FERC's discretion, as FERC itself has clarified in its brief. FERC having found it "just and reasonable" for NOPSI to *obtain* 17% of Grand Gulf power, NOPSI cannot have been imprudent to *retain* that power "for resale" to retail customers, rather than simultaneously to sell it off.

Indeed, the facts of this case demonstrate that the Council's proposed distinction would permit the wholesale subversion of FERC's regulation. Here, FERC found that the MSU System's construction and completion of Grand Gulf were part of a reasonable system plan to diversify fuel sources.[5] Indeed, FERC specifically found that NOPSI and the other MSU companies acted prudently in 1980 when they decided to continue construction of the plant because it then appeared that Grand Gulf would "produce power for a total cost (capacity and

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[5] *Middle South Energy*, 31 FERC ¶ 61,305, p. 61,653-55 (1985).

energy) *which would be less than existing alternatives on the system,*" including coal-fired alternatives.[6]

However, in disallowing $135 million of FERC-mandated costs, the Council found precisely the opposite: that it was clear in 1980 that the Grand Gulf power would be far more expensive than alternative coal-fired power and that a "prudent" NOPSI could have and should have sold its then-contingent share (to a hypothetical "sucker" utility) and purchased equivalent amounts of lower cost coal power instead. In particular, the Council's theory is that FERC can determine that Grand Gulf represented prudent planning for the MSU system as a whole, but that the five different state and local rate-making bodies can revisit this issue and find, based on "local conditions," that individual MSU operating companies should have second-guessed the system's planning process, anticipated FERC's allocation, and sought to nullify both.[7]

Against this background, it could not be clearer that, whatever its label, the Council's finding that it was imprudent for NOPSI to retain its Grand Gulf interest is nothing more than an attack on FERC's explicit contrary determinations. In this regard, it is elementary that the preemptive effect of a FERC Order cannot be evaded through such "artful pleading" (*Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 324 (1981)) and that state action is preempted when, as here, it has the "effect of 'trapping'" FERC-mandated costs. *MP&L*, 487 U.S. at 372 n.12.

Finally, the Council's proposed distinction is particularly spurious for one additional reason. By deciding

[6] *Middle South Energy*, 26 FERC ¶ 63,044, pp. 65,112-65,113 (1984) (emphasis added), *aff'd* 31 FERC ¶ 61,305, pp. 61,655 & 61,666 (1985).

[7] It is thus no coincidence that the Council's formula reallocates the Grand Gulf percentages previously allocated by FERC and assigns to New Orleans the same 9% that the Council for years unsuccessfully urged before FERC.

that NOPSI could have reduced its wholesale costs by engaging in hypothetical wholesale sales and purchases of power that are within FERC's jurisdiction—and that the putative "benefits" would not be shared by other MSU operating companies—the Council has determined matters that are at the very heart of FERC's jurisdiction.[8] This epitomizes the "speculation" about FERC's decisions that the "filed rate doctrine forbids." *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 579 (1981).

II. The Court's Earlier Abstention Holding Has No Pertinence To These Issues.

Because *MP&L*, *Nantahala*, and their precursors are so clearly controlling, the Council devotes virtually its entire Opposition to assertions that this Court's earlier *abstention* decision in this case (*"NOPSI III"*) somehow rejected NOPSI's "facial" *preemption* claim and overruled *MP&L* and *Nantahala sub silentio.*

Plainly, only the Court is in a position to know what it meant in the passage from *NOPSI III* that the Council repeatedly cites. *See, e.g.*, Opp. 2-3, quoting 109 S. Ct.

[8] The Council's Order assumes both (1) that FERC would have allowed the hypothesized wholesale sales and purchases in 1980, and (2) that FERC would have allocated the hypothesized cost savings to NOPSI. The latter assumption, in particular, is contradicted by FERC's treatment of AP&L (which was allocated its pro rata share of Grand Gulf and denied the cost savings that resulted from its purchases of coal capacity and its success in contracting away all its Grand Gulf obligation). In any event, the Council's assumption constitutes "precisely what the filed rate doctrine [and settled pre-emption principles] forbid[]." *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 579 (1981). "[I]t amounts to nothing less than the award of a retroactive rate [reduction] based on *speculation* about what the Commission might have done had it been faced with the facts of this case." *Id.* at 578-79 (emphasis added).

The Council's sole response to all these points is to argue (Opp. 15-18) that FERC could not have considered these issues because the transactions in question are hypothetical, not real. But *all* the prudence claims that FERC (and other regulatory agencies) address involve hypothetical questions whether utilities could have and should have behaved differently. Here, these questions pertain to matters that are within FERC's exclusive jurisdiction.

2506, 2517 (1989). However, as the Fifth Circuit held (App. 9A-10A), there is nothing in the Court's Opinion that remotely suggests that it was overruling *MP&L* and *Nantahala* without saying so and without even discussing the holdings of those cases. To the contrary, the Court held that the lower court had erred in refusing to decide NOPSI's facial preemption claim (109 S. Ct. at 2515, 2520) and the Court stated it would not address the merits of that claim (109 S. Ct. at 2509-10).

Indeed, the Court was addressing a very different issue in the language the Council quotes: NOPSI's claim that this case fell within the "exception" to the *Younger* doctrine for challenges to state laws that are "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence, and paragraph." *Younger* v. *Harris*, 401 U.S. 37, 53 (1971). All the Court held in *NOPSI III* was that if this exception exists, it must be a narrow one and would not be applied to a state rate-making order that did not purport to set wholesale rates or directly or indirectly to challenge a FERC order—as the Council's Order concededly does not. 109 S. Ct. at 2517. This holding, by its terms, has pertinence only to the abstention issue then before the Court, and has nothing to do with the merits of NOPSI's preemption claims —as the Fifth Circuit held.

III. The Council's Remaining Attempts To Avoid Review Are Meritless.

The Council's two remaining attempts to avoid review are spurious. First, it seeks to minimize the importance of this case by claiming that the federal preemption issues are of "historical interest only" and will not arise often in the future. Opp. 21-22. However, FERC, the Solicitor General's Office, and the electric industry have concluded precisely the opposite in urging the Court to review the Fifth Circuit decision. They recognize that, unless reversed, the Fifth Circuit's holding will lead states to act on their potent incentives to further their parochial interests and to thwart FERC's regulation of inter-

state power supply arrangements—as they have attempted to do in a vast array of circumstances.[9]

Finally, the Council argues that NOPSI is precluded from litigating its federal preemption claims in this case, and must await a final decision in the pending state proceedings before it may seek review in this Court. Opp. 19-21. This is a reprise of a Louisiana state law claim that both lower courts rejected: that an earlier state court trial decision is *res judicata* under Louisiana law and is thus entitled to full faith and credit under 28 U.S.C. § 1738 in this case. As the Fifth Circuit held (App. 23a), the Council's argument is "contrary" to the Louisiana statute that provides that a "final judgment" of a Louisiana court does not become *res judicata* ("the thing adjudged") until "there can be no [further] appeal." [10]

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[9] As FERC and the industry recognize, it is irrelevant that "most" nuclear "plants are complete." *Compare* Opp. 21. First, state attempts to impair FERC's jurisdiction over wholesale rates have not been confined to nuclear plants, but have repeatedly arisen in the cases of transmission agreements, power pooling arrangements, and coal-fired, hydroelectric, gas-fired, and oil-fired plants, as well as nuclear plants. *See, e.g., Appalachian Power Co.* v. *Public Serv. Comm'n of West Virginia*, 812 F.2d 898 (4th Cir. 1987) (transmission agreement); *Kentucky Power Co.* v. *Kentucky Pub. Serv. Comm'n*, No. 86-CA-1031-MR (Kentucky Ct. of Appeals, June 2, 1988) (coal plant). *See also Nantahala, supra* (hydroelectric plant). Further, the completion of "most" nuclear plants does not eliminate the issue of the "pass-through" of wholesale costs for even these plants, for they typically have useful lives of 30 years and more.

[10] La. Civ. Code art. 3556(31). Incredibly, the Council bases its contrary claims on the intervening Louisiana legislation that is designed to change the law of *res judicata* so that future Louisiana state trial judgments will have preclusive effect while pending on appeal. Acts 1990, No. 521, § 1. However, the Council does not inform the Court that the new statute only applies to cases brought *"on or after January 1, 1991," (id.,* § 5) and that the earlier statute continues to determine what preclusive effect the state court trial judgment in this case is to be given in federal courts under 28 U.S.C. § 1738. Similarly, the *lis pendens* statute that the Council cites (La. Code Civ. Proc. art. 531) is irrelevant for two reasons. First, the federal and state suits do not have the "same parties,"

Moreover, because the Fifth Circuit has decided the merits of the federal preemption claim, its judgment will, unless reversed, preclude NOPSI from litigating its facial preemption claim in the pending state appeals or any other forum. *See* Pet. 10-11 & n.8. Thus, the Fifth Circuit's judgment presents, if anything, a more compelling case for review than did the lower court's decision in *MP&L*. *See* Pet. 21-22.

Conclusion

Because this case is squarely controlled by this Court's decisions in *MP&L* and *Nantahala*, the Fifth Circuit's decision can be summarily reversed. Alternatively, the petition for a writ of certiorari should be granted and the case set for oral argument.

Respectfully submitted,

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which prevents any application of this statute. Second, this statute does not apply when parallel cases are pending in state and federal court, which is a subject addressed by a separate Louisiana *lis pendens* statute (*id.* art. 532). If this latter statute were otherwise applicable here (as it is *not* because the suits do not have the "same parties"), it would require a stay of the *state* suit and impose no limitation on the prosecution of federal court litigation.